No. 17-965

IN THE

Supreme Court of the United States

DONALD J. TRUMP, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CATHOLIC CHARITIES USA, AND CATHOLIC LEGAL IMMIGRATION NETWORK, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[*]

The United States Conference of Catholic Bishops. The United States Conference of Catholic Bishops (the "Conference" or "USCCB") is an assembly of the leadership of the Catholic Church of the United States to which all the active Cardinals, Archbishops, and Bishops belong. The Conference seeks to coordinate and encourage Catholic activities in the United States; to protect religious liberty; to conduct religious, charitable, and social welfare work at home and abroad; to aid in education; to care for migrants and refugees; and generally to further these goals through education, publication, and advocacy. When lawsuits touch upon central Catholic tenets, as this case does, the Conference files *amicus curiae* briefs to make its views known.

Our beliefs emphasize the importance of assisting the most vulnerable members of society. To that end, the Conference engages in extensive faith-based work on behalf of migrants and refugees. The Conference's Committee on Migration sets broad policies for the Church's work in the area of migration. Protecting refugees and finding long-lasting solutions to their plight is one of the Committee's highest priorities. The Committee has arranged site visits to refugee areas around the world and has called for action from the international community.

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[*] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this brief.

The Committee also oversees the Conference's Office of Migration and Refugee Services, which is charged with "fulfill[ing] the commitment of the U.S. Catholic bishops to protect the life and dignity of the human person" by "serv[ing] and advocat[ing] for refugees, asylees, migrants, unaccompanied children, and victims of human trafficking." USCCB, *Migration and Refugee Services*, "Mission Statement," https://goo.gl/X6Hba9. Migration and Refugee Services carries out this mission by engaging in advocacy, education, refugee resettlement, and other specialized services to vulnerable populations. In fact, Migration and Refugee Services, working in collaboration with local Catholic Charities offices across the United States, is the largest refugee resettlement agency in the country, resettling about one-fourth of the refugees coming to the United States.

The moral and religious obligation to protect migrants and refugees is owed to people of all faiths, including Muslims. As the Second Vatican Council explained in *Nostra Aetate*, the Church holds Islam and its adherents in "esteem" in light of the common principles and practices of the two religions. *See Nostra Aetate*, no. 3 (1965), https://goo.gl/iSYPTo. In the same document, the Church urges Catholics to "work sincerely for mutual understanding" with their Muslim brethren, and to "promote together for the benefit of all mankind social justice and moral welfare, [and] peace and freedom." *Ibid.* Similarly, the Catholic commitment to religious freedom is rooted in respect for the dignity of *every* human person—including not only Catholics and other Christians, but Muslims and other non-Christians as well. *See Dignitatis Humanae* (1965).

Much like the Muslim migrants and refugees that the Proclamation singles out for disfavor, Catholic immigrants seeking a better life in the United States were once the targets of widespread animus. Having experienced such harsh treatment themselves, and having been the victims of discriminatory legislation motivated by religious animus, Catholics cannot be silent when other religious groups are targeted for mistreatment.

Catholic Charities USA. Catholic Charities USA is the national office for Catholic Charities agencies nationwide. For more than 100 years it has guided and supported the vast network of Catholic Charities agencies in a common mission to provide service to people in need, advocate for justice in social structures, reduce poverty, support families, and empower communities. In 2016, Catholic Charities agencies employed more than 57,000 individuals at 2,951 service sites in 49 states, the District of Columbia, and the 5 U.S. territories. Collectively, in 2016, these agencies provided services to more than eight million poor and vulnerable persons, including assistance in the settlement of more than 23,400 refugees and in the ongoing resettlement of more than 28,000 refugees.

Since Catholic Charities' founding in 1910, its ministries have responded to the particular needs of newcomers to our country. From the influx of migrants in the late 19th and early 20th centuries to today, Catholic Charities agencies have worked to serve migrants and refugees, regardless of those individuals' religious belief. This work is motivated by the biblical experience of migration, which teaches all Cath-

olics to care for migrants. "Jesus himself was a migrant—born in a manger on a journey, h· i his family fled to Egypt, and in his ministry he had 'nowhere to lay his head.' [Catholics] have been taught by Him to look for Him in the faces of migrants and to welcome the stranger." Catholic Charities USA, *Justice for Newcomers: A Catholic Call for Solidarity and Reform* at v (2005) (quoting Matthew 8:20), https://goo.gl/6BX6GH.

This gospel requirement to serve refugees and migrants regardless of religious belief has long guided the work of Catholic Charities USA. Reflective of this history, Monsignor John O'Grady, Ph.D., the executive secretary of the National Conference of Catholic Charities (now Catholic Charities USA), worked extensively to promote refugee resettlement following World War II.

Informed by its experiences and reflecting its faith and history, Catholic Charities USA continues its efforts to serve refugees and to advocate for just refugee resettlement policies. In 2017, Catholic Charities agencies, working with the U.S. Conference of Catholic Bishops, settled 16,084 refugees and launched a national campaign to support the ongoing needs of refugees settled in the United States.

The Catholic Legal Immigration Network, Inc. The Catholic Legal Immigration Network, Inc. ("CLINIC"), a national religious organization created in 1988 by the Conference, embraces the Gospel value of welcoming the stranger and promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of Catholic and community

legal immigration programs. CLINIC's network includes approximately 330 faith- and community-based immigration legal programs in more than 400 cities, and employs roughly 1,400 legal representatives, including lawyers, Department of Justice-accredited representatives, and paralegals who serve hundreds of thousands of citizens and immigrants each year.

As a religious organization dedicated to the fair and just administration of United States immigration laws, CLINIC is alarmed by the Proclamation, titled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats," which has the principal effect of preventing nationals from certain majority-Muslim countries from entering the United States, including refugees. CLINIC has a substantial interest in the Court's resolution of this case because the issues this Court will decide have a direct impact on the work of CLINIC's network and the immigrants and resettled refugees it serves. Within CLINIC's network, up to 90% of legal immigration programs provide family-based immigration services, and, moreover, a majority of CLINIC's network provides legal assistance for resettled refugees. Consequently, CLINIC has a substantial interest in ensuring that intending immigrants can be united with their families, as well as refugees safely resettled, and that each group is not denied entry to the United States on constitutionally impermissible grounds like religious belief.

SUMMARY OF THE ARGUMENT

The Proclamation ("EO-3"), like its predecessors, has both the purpose and the effect of discriminating against Muslims. Prior to issuing the Proclamation, the President repeatedly announced his desire to target Muslims for denial of entry to the United States. And Section 2 of EO-3 does just that, singling out the populations of six overwhelmingly Muslim nations for sweeping immigration restrictions that, for all practical purposes, apply nowhere else in the world.

Such blatant religious discrimination is repugnant to the Catholic faith, core American values, and the United States Constitution. It poses a substantial threat to religious liberty that this Court has never tolerated before and should not tolerate now. Having once borne the brunt of severe discriminatory treatment, particularly in the immigration context, the Catholic Church will not sit silent while others suffer on account of their religion. In the words of Elie Wiesel, "[t]he opposite of faith is not heresy, it's indifference." Elie Wiesel, *One Must Not Forget*, U.S. News & World Report, Oct. 27, 1986.

This Court should strike down Section 2 of the Proclamation as a violation of the Free Exercise Clause of the First Amendment.

ARGUMENT

I. THE PROCLAMATION DISCRIMINATES ON THE BASIS OF RELIGION IN VIOLATION OF THE FREE EXERCISE CLAUSE.

The Proclamation is an implementation of the Administration's repeatedly expressed antipathy to

Muslims and to Islam. Indeed, prior to assuming office, the President called for "a total and complete shutdown of Muslims entering the United States." J.A. 119 (internal quotation marks omitted). After his inauguration, he and his advisors continued to call for a Muslim travel ban, issued three such executive orders (each promptly blocked by the courts), and repeatedly made anti-Muslim statements, including around and after the time he issued EO-3. *IRAP* v. *Trump*, 883 F.3d 233, 265–67 & n.15 (4th Cir. 2018) (en banc) (cataloging statements from 2016 through the issuance of EO-3 and beyond); *see also* J.A. 159–68.

Religious discrimination often can be difficult to identify, shrouded in neutral-sounding principles or benign-seeming justifications. *See Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993) (recognizing that courts must "survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders" (internal quotation marks omitted)). "But this wolf comes as a wolf." *Morrison* v. *Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

Such blatant discrimination on the basis of religion is abhorrent to Catholic teaching, is inconsistent with American values, and, most importantly for present purposes, violates the Free Exercise Clause of the First Amendment. This Court should relegate the discriminatory Proclamation to the dustbin of history, so it will do no further harm. *See Korematsu* v. *United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) ("[O]nce a judicial opinion . . . rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the

principle of . . . discrimination," which "then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."); *see also* Pope Francis, Address to the Joint Session of the United States Congress, 161 Cong. Rec. H6193 (daily ed. Sept. 24, 2015) ("The yardstick we use for others will be the yardstick which time will use for us.").

A. The Text and Context of the Proclamation Leave No Doubt That It Targets Muslims for Special Disfavor, Failing the Basic Requirement of Religious Neutrality.

Our Nation was founded as a refuge for religious adherents fleeing persecution. The First Amendment enshrines this dedication to religious liberty, providing that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. The Free Exercise Clause "'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 533, 542).

The Free Exercise Clause was a response to "historical instances of religious persecution and intolerance" in the colonial era. *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.). The "English legacy was not a happy one" for religious liberty. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421 (1990). "[B]oth Roman Catholicism

and extreme Protestantism . . . were suppressed," and many of the colonies were also hostile to other minority religions. *See id.* at 1421–30. "In assuring the free exercise of religion," the Framers of the First Amendment were thus acutely "sensitive to the then recent history of those persecutions and impositions of civil disability with which sectarian majorities in virtually all of the Colonies had visited deviation in the matter of conscience." *McGowan* v. *Maryland*, 366 U.S. 420, 464 (1961) (opinion of Frankfurter, J.). Forged from this experience over the course of the last two centuries, the freedom to exercise one's own religion without government sanction has persisted as a core American value. It is a beacon of hope around the world.

Under this Court's precedent, any law that singles out the members of a particular religious faith for special disabilities must be struck down unless it survives strict scrutiny. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531–32; *Emp't Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring in the judgment).

Here, the Proclamation fails this basic test of religious neutrality. The President issued it against the backdrop of his numerous "disparaging comments and tweets regarding Muslims," "repeated proposals to ban Muslims from entering the United States," "the issuance of EO-1 and EO-2, addressed only to majority-Muslim nations," and statements "describing [EO-3] as having the same goal as" the prior bans. *IRAP*, 883 F.3d at 264. *See, e.g.*, J.A. 120–21 (the President asserting that "Islam hates us" and that "[w]e can't allow people coming into this country who have this hatred" (internal quotation marks omitted)); J.A. 121

("We're having problems with Muslims coming into the country." (internal quotation marks omitted)); J.A. 132–33 ("That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!" (internal quotation marks omitted)).

Viewed in the context of these and the many other inflammatory public statements catalogued by the lower courts in challenges to this latest incarnation of the travel ban (and those challenging EO-1 and EO-2), the discriminatory intent of the Proclamation—which *indefinitely* suspends entry of nationals from six predominantly Muslim nations—is clear.

The Proclamation's disproportionate effect on Muslims is further evidence of its discriminatory intent. As the Court has explained, "[a]part from the text, the effect of a law in its real operation is strong evidence of its object." *Church of the Lukumi Babalu Aye*, 508 U.S. at 535. And the effect of EO-3 "in real operation," like the prior bans, is targeted overwhelming at Muslims. As the Fourth Circuit recognized, "Iran's [Muslim population] is 99.5%, Libya's is 96.6%, . . . Somalia's is 99.8%, Syria's is 92.8%, and Yemen's is 99.1%." *IRAP* v. *Trump*, 857 F.3d 554, 572 n.2 (4th Cir. 2017) (en banc) (citing Pew Res. Ctr., *The Global Religious Landscape* 45–50 (2012)).

To be sure, EO-3 adds North Korea and Venezuela as countries subject to the travel ban. But as the courts below recognized, those superficial additions impacted "very few persons from those countries," *IRAP*, 883 F.3d at 268, and are of "little practical consequence," *IRAP* v. *Trump*, 265 F. Supp. 3d 570, 623 (D. Md. 2017). Department of State data reveals that

the North Korea provision impacted "fewer than 100 people," "a fraction of one percent of all those affected." *Ibid.* And the Venezuela provision is limited on its face to a small group: government officials from selected agencies and their families. Proclamation Sec. 2(f)(ii). In addition, EO-3 added Chad, another Muslim-majority country, to the roster of banned nations. *See* Chad, *CIA World Factbook* (2018), https://goo.gl/v7iazC.

As the *en banc* Fourth Circuit correctly concluded, "[n]o reasonable observer could swallow the claim that the[se]" minor cosmetic changes "had cast off the objective so unmistakable in the earlier" ones. *IRAP*, 883 F.3d at 268 (quoting *McCreary Cty.* v. *ACLU*, 545 U.S. 844, 872 (2005)). In any event, "[i]t is a discriminatory purpose that matters, no matter how inefficient the execution." *Hawai'i* v. *Trump*, 241 F. Supp. 3d 1119, 1135 (D. Haw. 2017) (quoting *Aziz* v. *Trump*, 234 F. Supp. 3d 724, 737 (E.D. Va. 2017)).

Thus, the Proclamation, which not only arises out of express hostility to Islam, but actually operates to target Muslims for special disfavor, is presumptively unconstitutional and can be justified only if it is narrowly tailored to serve a compelling government interest. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531–32; *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment).

B. Excluding Migrants and Refugees on the Basis of Religion Fails Strict Scrutiny and Is Unconstitutional.

In the face of such a stark display of religious discrimination, this Court should apply "the most rigorous of scrutiny" to EO-3's travel ban, *Church of the*

Lukumi Babalu Aye, 508 U.S. at 546, and strike it down as unconstitutional. Leaving the Proclamation's indefinite ban in place would deal a severe blow to religious freedom and set a dangerous precedent for adherents of all religious faiths.

To be sure, national security is an "interest[] of the highest order." *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978) (quoting *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972)). But the government bears a heavy burden to show that the interest is actually implicated in this case, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006), and that the religious discrimination at issue is narrowly tailored to serve that interest, *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment). The government has not come close to meeting this exacting burden.

On the contrary, the government has made no serious effort to demonstrate why such a sweeping anti-Muslim measure is needed for national security. Instead, following the repeated expressions of hostility to Islam noted above, the Proclamation paints the *entire* population of *entire* predominantly Muslim countries with the same broad strokes, even though none of those countries has been home to any of the terrorists that have struck the homeland before. In the words of a broad group of national security, foreign policy, and intelligence officials from Republican and Democratic administrations, "[a]s a national security measure, this Ban is unnecessary," and in fact it "undermine[s] the national security of the United States." J.A. 356, 362.

U.S. intelligence services have similarly concluded that restricting immigration from predominantly Muslim nations will not deter terrorism. Only months before the Proclamation, the Department of Homeland Security's Office of Intelligence and Analysis found that "most foreign-born, U.S.-based violent extremists became radicalized many years after entering the United States," and concluded that "increased screening and vetting was therefore unlikely to significantly reduce terrorism-related activity in the United States." *IRAP*, 857 F.3d at 575 (citing report at J.A. 426); *see also ibid.* ("[A] separate DHS report indicated that citizenship in any country is likely an unreliable indicator of whether a particular individual poses a terrorist threat." (citing document at J.A. 424)).

Indeed, underscoring its true purpose, the "criteria allegedly used in the review to identify problematic countries lie at odds with the list of countries actually included in the Proclamation." *IRAP*, 883 F.3d at 269. For example, EO-3 "does not include non-Muslim majority countries such as Belgium where there have been widely-documented problems with information sharing, and whose nationals have carried out terrorist attacks on Europe." J.A. 361 (declaration of former national security officials). *See O Centro*, 546 U.S. at 433 ("[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 547 (quoting *Fla. Star* v. *B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in the judgment))) (alterations original)).

Such under- and over-inclusiveness "raises serious doubts about whether the government is in fact pursuing the interest it invokes." *Brown* v. *Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011). For these and other reasons, the Proclamation fails strict scrutiny and cannot stand. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 547 (invalidating ordinances because they were "underinclusive to a substantial extent with respect to each of the interests that respondent has asserted").

II. THE CATHOLIC CHURCH TAKES A STRONG STAND AGAINST RELIGIOUS DISCRIMINATION IN ALL ITS FORMS.

Amici are deeply concerned about the Proclamation, which, like its predecessors, poses a serious threat to religious liberty in general and Muslims in particular. American Catholics will recall a time not too long ago when they were the targets of discriminatory immigration restrictions and nativist sentiment, often in the name of national security. Our Constitution must serve to protect migrants and refugees of all religious faiths—particularly those faiths that find themselves the subject of disfavor—and so must forbid denial of admission to the United States on the basis of religion.

A. Catholic Immigrants to the United States Have Experienced Discrimination Firsthand.

1. This Nation was founded on the belief that freedom of religion is an essential condition of a free and democratic society. As George Washington wrote in his letter to the Annual Meeting of Quakers in 1789, "the Conscientious scruples of all men should be

treated with great delicacy & tenderness and it is my wish and desire that the laws may always be . . . extensively accommodated to them." George Washington, Letter to the Annual Meeting of Quakers (Oct. 13, 1789), https://goo.gl/hHo9Em.

George Washington made clear that the need for religious liberty and diversity extended to welcoming refugees and migrants of all faiths: "The bosom of America is open to receive not only the opulent & respectable Stranger, but the oppressed & persecuted of all . . . Religions; whom we shall wellcome to a participation of all our rights & previleges, if by decency & propriety of conduct they appear to merit the enjoyment." Letter from George Washington to Joshua Holmes (Dec. 2, 1783), https://goo.gl/Du9TPW.

2. Unfortunately, despite the noble ideals espoused by the founders and embodied in our Constitution, the American experience has not always been a happy one for Catholics, particularly in the context of immigration. *See* Rory Carroll, *America's Dark and Not-Very-Distant History of Hating Catholics*, The Guardian, Sept. 12, 2015. Early settlers brought "anti-Catholic bias . . . to Jamestown in 1607 and vigilantly cultivated [it] in all the thirteen colonies from Massachusetts to Georgia." John Tracy Ellis, *American Catholicism* 19 (2d ed. 1969). Colonial charters specifically singled out Roman Catholics, prohibiting them from, for example, holding political office. *See* McConnell, *supra*, 103 Harv. L. Rev. at 1423–24 (discussing anti-Catholic laws in colonies "throughout the South," where "Catholics . . . were detested and excluded").

Anti-Catholic sentiment persisted through the nation's founding. John Jay authored an address "to the People of Great Britain" on behalf of the Continental Congress accusing Parliament of plotting to "reduce the ancient, free Protestant colonies to" a "state of slavery" by encouraging Catholic emigration to North America, and thus, he wrote, promoting a religion that "dispersed impiety, persecution, murder and rebellion through every part of the world." Address to the People of Great Britain (1774), 1 *The Correspondence and Public Papers of John Jay (1763–1781)*, https://goo.gl/KfmKFY.

In the 19th and early 20th centuries, Catholic immigrants suffered pernicious discrimination as they sought a better life for themselves and their families. The number of Catholics living in the United States had already increased from 30,000 at the time of the Founding to 600,000 by 1830. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 299 (2001). And beginning in the 1830s, increased immigration from Ireland and Germany (and later Italy) "began to swell" the Catholic ranks. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Leg. Hist. 38, 42 (1992). "By 1850, 1.6 million Catholics lived in America, and by 1900 that number rose to 12 million." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 720 (2002) (Breyer, J., dissenting).

"'Dreading Catholic domination,' native Protestants 'terrorized Catholics.'" *Zelman*, 536 U.S. at 720 (Breyer, J., dissenting) (quoting Philip Hamburger, *Separation of Church and State* 219 (2002)); *see also Mojica* v. *Reno*, 970 F. Supp. 130, 145 (E.D.N.Y. 1997) (observing that prejudice against

Irish and Italian immigrants, primarily Catholic, "emerged as these groups emigrated in substantial numbers"). As early as 1841, Samuel Morse, the New York newspaper editor and inventor of Morse code, declared to a sympathetic audience that "the evil of immigration brings to these shores illiterate Roman Catholics . . . the obedient instruments of their more knowing priestly leaders." Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America* 56–57 (2002) (alteration original). And Josiah Strong, a prominent Protestant leader and best-selling author, included "immigration" and "Catholicism" as the first two threats on his "list of seven perils facing the nation." Jeffries & Ryan, *supra*, 100 Mich. L. Rev. at 303; *see also* Richard E. Morgan, *The Supreme Court and Religion* 47 (1972) ("The nineteenth century was pockmarked by this virulent fusion of hostility to the newcomer and inherited No-Popery.").

3. Some of the most severe hostility towards Catholics appeared in the realm of education. In the 19th century, the majority of schools were "propagators of a generic Protestantism that . . . was intolerant of those who were non-believers." Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 559 (2003) (internal quotation marks omitted). Students were frequently made to listen to or read from "the Protestant King James Bible." *Ibid.* Those who refused "suffered beatings or expulsions." *Zelman*, 536 U.S. at 720 (Breyer, J., dissenting) (quoting Jeffries & Ryan, *supra*, 100 Mich. L. Rev. at 300). Other

general "[a]ttacks on the Catholic faith were commonplace, as were slurs against the Irish ethnicity of many of the new immigrants." DeForrest, *supra*, 26 Harv. J.L. & Pub. Pol'y at 559.

In response to this hostility, Catholics "set up parochial schools and sought shares of the common school fund or exemptions from taxation." Green, *supra*, 36 Am. J. Leg. Hist. at 41; *see also Zelman*, 536 U.S. at 720 (Breyer, J., dissenting).

But this approach drew significant ire from Protestant majorities, reaching a fever pitch in the 1870s "with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.); *see also* H.R.J. Res. 1, 44th Cong., 1st Sess., 4 Cong. Rec. 205 (1875). The measure followed on the heels of President Ulysses S. Grant's thinly veiled (and politically popular) attacks on Catholic schools in which he "resolv[ed] that not one dollar . . . shall be appropriated to the support of any sectarian schools" and called for a constitutional amendment "prohibiting the granting of any school funds or taxes . . . for the benefit or in aid, directly or indirectly, of any religious sect or denomination." Green, *supra*, 36 Am. J. Leg. Hist. at 47, 52 (internal quotation marks and citations omitted).

Although the text of the Blaine Amendment did not expressly use the word "Catholic," its discriminatory intent and effect—much like the Proclamation here—were unmistakable given the "pervasive hostil-

ity to the Catholic Church and to Catholics in general," as well as the "open secret that 'sectarian' was code for 'Catholic.'" *Mitchell*, 530 U.S. at 828 (plurality op.); *see also* DeForrest, *supra*, 26 Harv. J.L. & Pub. Pol'y at 564 (describing a similar proposed amendment that "had the benefit of appearing neutral while at the same time effectively targeting only the Catholic schools").

B. The Catholic Church Is Committed to Helping Migrants and Refugees of All Religious Faiths.

1. Catholics' own experience with discrimination in the United States informs the Church's commitment to advocating on behalf of migrants and refugees of all religious faiths. "Having once felt the sting of religious persecution in the United States, American Catholics understand that the majority can do great violence to the constitutional rights of an insular religious minority." Loredana Vuoto, *Could Trump's Muslim Ban Threaten Everyone's Religious Freedom?*, Catholic News Agency, Jan. 14, 2016, https://goo.gl/4qzhyV (quoting First Liberty Institute Deputy General Counsel Matthew Kacsmaryk).

Thus, as Cardinal Theodore McCarrick and others have emphasized, the Church advocates on behalf of migrants and refugees of all faiths; the mandate to speak out on their behalf arises "not because they are Catholic, but because we are Catholic." The Universal Church as Defender of the Rights of Migrants (Mar. 21, 2011) (internal quotation marks omitted), https://goo.gl/A4RLN2. Pope Francis recently explained that "American Catholics are committed to

building a society which is truly tolerant and inclusive, to safeguarding the rights of individuals and communities, and to rejecting every form of unjust discrimination." Address at South Lawn of the White House (Sept. 23, 2015), https://goo.gl/nPNrtf. American Catholics "are likewise concerned that efforts to build a just and wisely ordered society respect their deepest concerns and their right to religious liberty"—"one of America's most precious possessions." *Ibid.*

2. The affirmative mandate to welcome migrants and refugees is deeply rooted in Catholicism, beginning in Scripture and continuing in modern teachings.

Abundant Biblical passages establish this core principle. For example, Exodus 23:9 teaches, "You shall not oppress a resident alien; you well know how it feels to be an alien, since you were once aliens yourselves in the land of Egypt." And Jesus later pronounced, "For I was hungry and you gave me food, I was thirsty and you gave me drink, a stranger and you welcomed me." Matthew 25:35. Put simply, the Bible repeatedly exhorts us to "exercise hospitality." Romans 12:13.

In recent decades, the Catholic Church has reemphasized these principles. *See generally* Catholic Legal Immigration Network, Inc., *Modern Catholic Social Teaching on Immigration: Notable Quotes* (2015), https://goo.gl/3pCoeK; Todd Scribner & J. Kevin Appleby, *On Strangers No Longer: Perspectives on the Historic U.S.–Mexican Catholic Bishops' Pastoral Letter on Migration* (2013). In 1952, against the backdrop of a refugee-filled post-war Europe, Pope Pius XII promulgated the apostolic constitution *Exsul Familia*, calling upon the Church to "offer refugees

and migrants a comfort in their trials," and to "look after them with special care and unremitting aid." https://goo.gl/9whnYr. In 1965, the Second Vatican Council called upon the national conferences of bishops to pay particular attention to the "migrants, exiles and refugees," often "not adequately cared for by the ordinary pastoral ministry." *Christus Dominus*, no. 18, https://goo.gl/aSN9Tm. Three decades later, Pope John Paul II recognized that an "atmosphere of welcoming is increasingly necessary," as "profoundly evidenced in the problem of millions of refugees and exiles," and "intolerance toward the person whose only 'fault' is a search for work and better living conditions outside his own country." Message of John Paul II for Lent 1998 (Sept. 9, 1997), https://goo.gl/Tydy7r.

Most recently, Pope Francis has highlighted the "moral imperative" of furthering these directives. Address to Participants in the 6th International Forum on Migration and Peace (Feb. 21, 2017), https://goo.gl/HXiPgA. Drawing on prior teaching of the Church, Pope Francis has called upon Catholics to "embrace all those fleeing from war and hunger, or forced by discrimination, persecution, poverty and environmental degradation to leave their homelands." Message of His Holiness Pope Francis for the Celebration of the 51st World Day of Peace (Jan. 1, 2018), https://goo.gl/kmFZUY. As the Pontiff explained, Catholics should "respond to the many challenges of contemporary migration with generosity, promptness, wisdom and foresight," by promoting "social and professional inclusion" and "integrating migrants and refugees." Message of His Holiness Pope Francis on the 104th

World Day of Migrants and Refugees 2018 (Aug. 15, 2017), https://goo.gl/jfeBuJ.

As Archbishop Joseph Kurtz (then-President of the Conference) explained at the height of the Syrian refugee crisis: "Regardless of their religious affiliation or national origin, these [individuals] are all human persons—made in the image of God, bearing inherent dignity, and deserving our respect and care and protection by law from persecution." Statement of Archbishop Joseph Kurtz of Louisville, KY and President of USCCB on the Syrian Refugee Crisis (Sept. 10, 2015), https://goo.gl/NErwZR.

3. In light of these traditions and teachings, the Catholic Church in the United States has long provided critical social services to migrants and refugees. It has participated in the federal government's resettlement program since it was formally established in the years following World War II, and has assisted in the resettlement of well over one million refugees since its inception. The early years of the program focused primarily on Central and Eastern Europe and the resettlement of predominantly Christian and Jewish refugees. The geographic expansion of the program in subsequent decades to areas including Africa, Asia, and the Middle East brought with it an increase in the number of non-Christian and non-Jewish refugees. Most recently, in 2016, the number of Muslim refugees resettled into the United States outpaced the number of Christian refugees *See* Jie Zong & Jeanne Batalova, Migration Policy Institute, *Refugees and Asylees in the United States* (June 7, 2017).

The Catholic Church has remained committed to the well-being and successful resettlement and integration of migrants and refugees without regard to their religious identity. The U.S. Conference of Catholic Bishops, in collaboration with Catholic dioceses and Catholic Charities agencies across the United States, has made services to migrants and refugees a key part of its principles and its programming. Hundreds of parishes and many local community-based service providers join in welcoming and assisting refugees and other migrants every year in various ways.

C. The Church, Through Its Pastoral Ministry to Migrants and Refugees, Has Witnessed Directly the Suffering Caused by the Discriminatory Proclamation and Its Predecessors.

1. In light of these teachings and the Catholic Church's long-standing commitment to migrants and refugees of all faiths, *amici* are compelled to speak out clearly against the injustice of EO-3.

After enactment of the original Executive Order, Bishop Joe S. Vásquez, the chairman of the Committee on Migration, reaffirmed the Conference's commitment to "assisting all those who are vulnerable and fleeing persecution, regardless of their religion." USCCB Committee on Migration Chair Strongly Opposes Executive Order Because It Harms Vulnerable Refugee and Immigrant Families (Jan. 27, 2017), https://goo.gl/Fbh5Aq. He reminded Catholics that "by helping to resettle the most vulnerable, we are living out our Christian faith as Jesus has challenged us to do." *Ibid.* In particular, the Conference "believe[s]

it is possible to simultaneously provide for the security of our country and have a humane refugee policy that upholds our national heritage and moral responsibility." USCCB Chairman Welcomes Ninth Circuit Decision Upholding Preliminary Injunction on Refugee Resettlement Pause and Travel Ban (June 13, 2017), https://goo.gl/UgtZiz.

In July 2017, after United States refugee admissions reached EO-2's cap of 50,000, Bishop Vásquez professed his "deep[] concern about the human consequences of this limitation and its impact on vulnerable refugees such as unaccompanied refugee children, elderly and infirm refugees, and religious minorities." U.S. Bishops Chairman Urges Administration to Raise Cap on Refugee Admissions (July 14, 2017), https://goo.gl/VSgzL6. "Now, these vulnerable populations will not be able to access needed protection and will continue to face danger and exploitation." *Ibid.*

2. *Amici* also have direct, firsthand experience with the human toll of the current Proclamation and its equally discriminatory precursors. *See* USCCB, *Those We Serve*, "Refugees," https://goo.gl/jNUsr8. The story of Bassam Osman, a thirty-six-year-old married father of five who fled the Syrian civil war for a better life in the United States, exemplifies refugees' acute need for assistance. Osman fled Aleppo with his seriously ill daughter in December 2011, eventually uniting with his family in a United Nations camp in Turkey. *See* Associated Press, *Syrian Refugee Finds His Place at Ohio Shoe Repair Shop*, Crux, July 5, 2017, goo.gl/G18a1N. After several years of "intense vetting involving five interviews and document searches," the Conference and its affiliates helped Osman and his family resettle in Cincinnati, Ohio. *Ibid.*

Osman and his family arrived just "six months before the Trump administration announced a ban to prevent most travel from Syria and six other predominantly Muslim countries." *Ibid.* Osman and his family have thrived in Cincinnati, where he has become a valued employee at a shoe repair factory and his children are learning English and adapting to American life. *Ibid.*

But because of the Proclamation and its precursors, other refugee families will not be so lucky. In Erie, Pennsylvania, Syrian refugees Samir Dabbah and Safwat Jarkas have been waiting for over a year for the government to approve the applications of their two youngest children, both of whom are in their early twenties. Madeleine O'Neill, *More Than One Year Into The Trump Administration, Refugee Resettlements Have Dropped Nationwide and in Erie*, Erie Times News, Feb. 8, 2018, goo.gl/WUF1A1. Dabbah worries that his chronic health problems will prevent him from seeing his son and daughter again. "He feels like he is not going to live for long," and "wishes his children (could) be with him at the end of his life." *Ibid.* (alteration original).

Fadumo Hussein, a Somali refugee in Columbus, Ohio, has also been waiting for over a year for her family to join her. Adam Geller, *Trump Policies Put Hopes on Hold for Refugees Waiting for Family*, The Courier, Mar. 27, 2018, goo.gl/DNQY3L. Hussein's parents were approved to enter the United States in January 2017—a few weeks before the first Executive Order—but their case is now on hold, and they remain in Uganda. *Ibid.*

Overall refugee admissions have plummeted, particularly from the nations covered by EO-3. In January 2017, there were 2,444 refugees admitted from the seven banned countries. In January 2018, there were *nine*. Dep't of State, Refugee Admissions Report (Feb. 28, 2018), https://goo.gl/Xwe95p. "[H]undreds of torture victims and others from troubled corners of the world are mired in the American refugee resettlement pipeline, and their hopes of reaching the United States are dwindling." Maria Sacchetti & Kevin Sieff, *Trump Praises Some Refugees But Remains Wary of Others*, Wash. Post, Jan. 31, 2018, https://goo.gl/7o2nKY.

For example, "[a] year" after EO-1 was issued, "hundreds of Somali refugees are still in Dadaab"—the "world's largest refugee camp"—"waiting to grab a chance to live in the United States." Harun Maruf, *One Year After US Travel Ban, Dying in a Refugee Camp*, Voice of Am., Jan. 26, 2018, https://goo.gl/9Ji1aG. Many, including children, are in desperate need of advanced medical care. For them "it is a matter of life and death." *Ibid.*

In particular, the Proclamation prevents the Conference from helping unaccompanied minors fleeing persecution. The Conference is one of two refugee resettlement agencies—along with Lutheran Immigration Refugee Services—authorized by the U.S. Department of State to help the Unaccompanied Refugee Minors Program identify children in need of resettlement and facilitate their placement with foster families across the country. *See* USCCB, *Children and Migration*, https://goo.gl/ZRXaQA. These foster families are critical to helping the most vulnerable refugees start a new life in America.

Irene Stevenson is one such example. She became a certified foster parent for an unaccompanied minor refugee after "thinking about literally the millions of children who have no family, have no home, who are completely alone." Justin Wm. Moyer, *Trump's Travel Ban Is Leaving Orphans Stuck in Refugee Camps*, Denver Post, July 28, 2017, https://goo.gl/4GjoVY. After six months of training, she cleared out a spare bedroom in her Washington home for A.A., a Somali girl who fled to Kenya in 2004 after war broke out. *Ibid.* But even though A.A. was approved to live with Stevenson, she remains in Kenya—where aid workers fear she will be targeted as an ethnic minority—first as a result of EO-2, and now because of EO-3. *Ibid.*

Irene Stevenson's story is not an outlier. The Executive Order has now "stranded more than 100 refugee children who were already matched to waiting American foster families." Ellen Knickmeyer, *Trump's Travel Bans Keep Orphans from US Foster Families*, Boston Globe, July 31, 2017, https://goo.gl/WFX684.

And there is a spillover effect onto the vital support services provided to recently arrived refugees. Resettlement groups, including the Conference and Catholic Charities, have been forced to close more than 18 sites and lay off or reassign hundreds of workers across the country. *See* Jack Jenkins et al., *Refugee Groups Fight Trump Travel Ban—And For Their Own Survival*, Nat'l Catholic Reporter, Feb. 17, 2018, https://goo.gl/USogQd; *see also* Mica Rosenberg, *Exclusive: Dozens of Refugee Resettlement Offices to Close As Trump Downsizes Program*, Reuters, Feb. 14, 2018, https://goo.gl/DQ8eXC.

If allowed to stand, the Proclamation's indefinite ban will prevent countless other vulnerable refugees—including children—from escaping persecution and starting a new life with the help of resettlement services from organizations like the Conference. Such cruel and inhumane treatment, denying refugee children life-saving entry to the United States based on an executive action clearly motivated by anti-religious bias, is both un-Catholic and un-American. It is also unconstitutional, and it is incumbent upon this Court to say so.

CONCLUSION

This Court should strike down Section 2 of the Proclamation as a violation of the Free Exercise Clause of the First Amendment.

Respectfully submitted.

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March 30, 2018